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No. 92-708

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SELOX, INC.,

Petitioner,

vs.

THOMAS A.J. FAUSEK, *et al.*,

Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Has Selox waived the attorney-client privilege by voluntarily producing the documents as to which the privilege was claimed?

2. Did the Sixth Circuit err in applying the principles of *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971), when it affirmed the district court's order compelling oral testimony and the production of documents in a discovery deposition?

3. Did Selox establish that the communications were privileged in the first instance?

STATEMENT OF CORPORATE AFFILIATIONS

Respondent Winona National and Savings Bank, Executor of the Will of Robert E. Maxwell, is a wholly owned subsidiary of Winona National Holding Company, a privately held Minnesota corporation.

Respondent First Interstate Bank of Arizona, N.A., is a wholly owned subsidiary of First Interstate Bancorp, a publicly owned California corporation.

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for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

RULE INVOLVED

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books,

documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

STATEMENT OF CASE

Petitioner seeks review of issues which arise out of a discovery dispute and an order compelling discovery against a claim of attorney-client privilege. There has been no trial, verdict or judgment in the district court.

Plaintiffs/Respondents are the former owners of forty percent of the shares of Selox, Inc., a closely-

held manufacturer of industrial gas. Plaintiffs sold their shares for $11 or $15 per share to Selox or to defendant Robert E. White, Selox's chief executive officer and controlling shareholder, who immediately thereafter sold the same shares for approximately $168 per share. Plaintiffs' complaints against defendant White, other corporate insiders and the alleged independent accountants for Selox state various claims under state and federal law, based on allegations that defendant White and others pursued a scheme to squeeze out minority stockholders and to gain control of Selox for their personal profit, and that they did so through wilful misrepresentations and undisclosed, insider information.[1]

In the course of discovery, plaintiffs, pursuant to a subpoena *duces tecum* (App. 30a[2]), deposed Joel W. Richardson, a partner in the Chattanooga, Tennessee, law firm of Miller & Martin, whose firm counseled defendant White and Selox during the alleged fraudulent activities. (It has not yet been established to what extent Mr. Richardson participated in, knew or suspected that his clients were engaged in a massive

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[1] In February and March 1992, while Selox's appeal was pending in the Court of Appeals, two new actions were filed in the United States District Court for the Eastern District of Tennessee naming Selox as the sole defendant. These collective actions were brought by all the named plaintiffs except the Elbert family, and also assert claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 *et seq.*, and various state common law claims for fraud and misrepresentation. The district judge consolidated the two new cases with the ten original cases. Selox is now attempting to appeal the consolidation order to the Sixth Circuit.

[2] All references to "App." are to the appendix contained in Selox's petition for a writ of certiorari.

fraud.) Mr. Richardson refused to answer a number of questions, claiming the privilege on behalf of Selox, defendant White, or both. Plaintiffs moved to compel him to testify and to produce the requested documents. (App. 35a)

The district court referred the matter to the magistrate judge, who considered the record, the briefs and the oral argument of counsel. Because defendant White was acting for both himself and the corporation in his dealings with Mr. Richardson, the magistrate judge held it was impossible to distinguish conversations which were for personal matters from those which were solely for corporate matters. (App. 27a) Further, because both defendant White and the corporation were buying plaintiffs' stock, all under the direction and control of defendant White, the magistrate judge held that the privilege could not apply to either. (App. 27a) The magistrate judge based his holding on the good cause exception set forth in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971), and the crime-fraud exception described in *In re Antitrust Grand Jury*, 805 F.2d 155 (6th Cir. 1986).

Both Selox and defendant White filed objections to the magistrate judge's decision, and the district court affirmed. (App. 28a) Thereafter, Selox alone appealed, and the Sixth Circuit also affirmed.[3] The Sixth Circuit entered its mandate on August 18, 1992 (App. 15a), and Selox did not seek a stay. Consequently, on October 8-9 and 19-21, 1992, plaintiffs' counsel reviewed

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[3] Because defendant White did not appeal, the abrogation of his personal privilege is not in issue.

documents, which were produced by Miller & Martin, with full knowledge of Selox, pursuant to the subpoena *duces tecum* to Mr. Richardson. Although there remains a dispute between plaintiffs and Selox as to the scope of the subpoena, Miller & Martin did produce for plaintiffs' inspection and copying all of the documents listed on exhibit 456 to Mr. Richardson's deposition. (App. 42a)

In essence, plaintiffs allege, and there is substantial proof in the record,[4] that beginning in 1980 defendant White and others, acting personally and on behalf of Selox, set in motion a scheme whereby defendant White and Selox would acquire all of Selox's outstanding shares for prices far below what they knew outsiders were willing to pay. Thereafter, defendant White sold those same shares to BOC Group, Inc., Selox's current owner, for more than ten times the amount he and Selox had paid plaintiffs. Only defendant White and his co-conspirators knew that BOC had been interested in acquiring Selox since around 1980.

Defendants accomplished this plan to squeeze out Selox's minority shareholders with various manipulative and deceptive devices which misled plaintiffs as to the actual value of their shares and as to defendant White's actual intentions with regard to Selox. In furtherance of this scheme, beginning in 1980, defendant White caused this closely-held corporation to cease paying dividends under the guise that Selox was financially unable to pay. At the same time, defendant White consistently maintained that he

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[4] The district judge denied the defendants' (in the ten original cases) various motions for summary judgment.

would never sell the company and that he intended to pass the company on to his children. Therefore, in the absence of either dividends or a public market for their stock, plaintiffs' only opportunity for economic benefit was to sell their stock to defendant White or to Selox for whatever price defendant White, who controlled Selox, was willing to pay.

In fact, the company's financial statements were false, and any real lack of cash flow was caused by defendant White's exorbitant salary and perquisites, his appropriation of corporate opportunities, and his shifting of his personal expenses to Selox. Also concealed from plaintiffs was the fact that nearly every major industrial gas company had contacted defendant White to inquire as to his interest in selling Selox. Once defendant White and Selox acquired the minority shareholders' stock, at $11 or $15 per share, defendant White immediately sold Selox to one of the very companies that had been pursuing him since 1980.

Beginning in 1984, Mr. Richardson represented both defendant White and Selox, and was involved, innocently or otherwise, in defendant White's appropriation of corporate opportunities and self-dealing, the concealment of information from minority stockholders, the purchase of stock from plaintiffs and obtaining releases from them long after the fact. It is in these areas that plaintiffs are entitled to discover Mr. Richardson's knowledge of defendant White's wrongdoing.

SUMMARY OF ARGUMENT

This is not a case that warrants certiorari review.

First, Selox has waived the attorney-client privilege with respect to the matters which it alleges are in issue. Selox states that the only matters of evidence at issue are the documents listed in exhibit 456 (App. 42a) and three areas of oral testimony. After the Sixth Circuit entered its judgment, Miller & Martin, with Selox's concurrence, produced to plaintiffs numerous documents, including all those listed in exhibit 456. The documents contain privileged communications in all areas Selox claims are at issue. Selox has therefore waived the privilege with respect to the exhibit 456 documents and with respect to the areas of oral testimony it claims are at issue. The questions raised in Selox's petition are therefore moot.

Second, there is no conflict among the circuits regarding the "good cause" exception to the corporate attorney-client privilege set forth in *Garner*. Neither Selox nor any circuit court disagrees with the "good cause" exception of *Garner*. Instead, Selox complains that the Sixth Circuit erred in its application of *Garner* to the facts in this case. In the absence of any conflict among the circuits, review by this Court on certiorari is unwarranted. Nor is certiorari review warranted to simply address the application of settled principles to a particular set of facts.

Third, contrary to Selox's assertion, the Sixth Circuit properly applied Tennessee law concerning the fiduciary duties of officers, directors and controlling shareholders of a corporation to their shareholders. Selox concedes that generally officers, directors and controlling shareholders owe a fiduciary duty to mi-

nority shareholders. Selox argues over the scope of those duties, and even if Selox is correct with respect to Tennessee law, the Sixth Circuit properly applied the *Garner* good cause exception, because good cause does not turn on any precise formulation of Selox's and defendant White's fiduciary duties to the minority shareholders.

Fourth, the Sixth Circuit did not reverse the burden of asserting the attorney-client privilege. Instead, the Sixth Circuit assumed that Selox had established the existence of the privilege, and held that the plaintiffs had demonstrated good cause under *Garner* to avoid the privilege.

Finally, the Sixth Circuit's decision is equally supportable on two independent grounds. First, Selox made a blanket claim of the attorney-client privilege without ever establishing the elements necessary to make the privilege apply. In addition, the communications for which Selox sought protection involved the commission of a crime or fraud and are therefore not subject to the privilege.

REASONS FOR DENYING THE PETITION

I. THE ISSUES RAISED IN THE PETITION ARE MOOT

As framed by Selox's petition, the only matters of evidence in issue are the documents listed in exhibit 456 (App. 42a) and the three areas of testimony listed on page 5 of its petition.[5] Assuming Selox is correct, then it has waived the attorney-client privilege, and the issues raised in Selox's petition are moot.

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[5] Plaintiffs do not accept Selox's description of the scope of the subpoena or the motion to compel; however, plaintiffs believe

On October 8-9 and 19-21, 1992, with Selox's knowledge and concurrence, Miller & Martin produced and counsel for plaintiffs reviewed numerous documents, including all of those listed on exhibit 456. The documents contain privileged communications relating to all three areas of oral testimony which Selox contends are at issue.

Having knowingly and voluntarily produced the exhibit 456 documents, Selox can no longer assert a privilege as to those documents. *See, e.g., In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1369 (D.C. Cir. 1984) (citations omitted) ("[A]ny voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege."). Furthermore, voluntary disclosure of the content of a privileged attorney-client communication constitutes waiver of the privilege as to all other communications on the same subject. *E.g., In re Sealed Case*, 877 F.2d 976, 980-1 (D.C. Cir. 1989). Having produced documents containing privileged communications in all relevant areas, Selox has waived the privilege as to all matters which it asserts are at issue, and therefore the issues raised in the petition are moot.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS

A.

Contrary to the position asserted by Selox, there is no conflict among the circuits regarding the "good cause" exception to the corporate attorney-client priv-

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that for the purpose of considering whether the issues raised by the petition are moot, Selox should be bound by its own, overly-narrow description.

ilege set forth in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971). The Fifth Circuit in *Garner* recognized an exception to the attorney-client privilege in the context of litigation involving a corporation and its shareholders. The court held that the availability of the privilege to a corporation is subject to the right of the stockholders to show cause why the privilege should not be invoked in the particular instance. 430 F.2d at 1103-4. No circuit court has rejected *Garner*'s good cause exception.

Selox argues that certiorari review by this Court is necessary because the lower courts have applied or not applied the exception to differing fact situations. That is the essence of Selox's complaint about the ruling of the Sixth Circuit—that the good cause exception should not have been applied in the facts of this case.[6] Neither Selox nor any circuit court attacks or disagrees with the principle of *Garner*'s good cause exception. The argument is simply about application. In the absence of a real conflict as to the principle of *Garner*, review by this Court on certiorari is not warranted.

In *Garner* stockholders of First American Life Insurance Company of Alabama (FAL) brought a class action alleging securities fraud and seeking to recover the purchase price they and others had paid for their stock in FAL. The defendants were FAL and various of its directors, officers and controlling persons. The plaintiffs also claimed FAL was itself damaged by the

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[6] In the lead-in to its summary of argument (p. 7), Selox contends that the Sixth Circuit "erred in its application of *Garner* . . . ."

alleged fraud, and they asserted a derivative action against various individual defendants. Plaintiffs deposed, and sought documents from, the attorney who advised FAL in connection with the issuance of its stock. The attorney and FAL asserted the attorney-client privilege and refused to reveal communications and advice between FAL and the attorney. *Id.* at 1095-6.

While acknowledging that the attorney-client privilege had application to the corporate client, the Fifth Circuit considered the assertion of the privilege in a "particularized context:"

> where the client asserting the privilege is an entity which in the performance of its functions acts wholly or partly in the interests of others, and those others, or some of them, seek access to the subject matter of the communications.

Id. at 1101. The court rejected the lower court's holding that the privilege was totally unavailable against the stockholders, and rejected the other extreme position that the privilege was inflexibly absolute. *Id.* at 1097. Instead, the Fifth Circuit remanded the case for a determination whether the stockholders could show good cause why the privilege should not be invoked in the particular circumstances of the case. Regarding the good cause determination, the court said:

> There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders;

> the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Id. at 1104.

In deciding the case below, the Sixth Circuit specifically agreed with the rationale of *Garner* and adopted its holding. (App. 8a) While Selox seems to question the integrity of the court and complains that the opinion does not cover point-by-point every factual consideration, the Sixth Circuit stated it examined each of the transactions as to which plaintiffs sought evidence, and found, upon application of *Garner*'s non-exclusive list of good cause indicia, that plaintiffs had established good cause for not permitting Selox to rely on the privilege. (App. 13a) Neither explicitly nor implicitly does the Sixth Circuit disagree with *Garner*. Rather, the Sixth Circuit applied *Garner* and correctly found that plaintiffs had shown good cause why the privilege should not apply.

B.

Selox had argued to the Sixth Circuit that *Garner* applies only in shareholder derivative actions. While *Garner* itself rejected such a limitation, *id.* at 1097 n.11, the Sixth Circuit acknowledged that Selox's contention finds "support" in *Weil v. Investment/Indicators Research & Management, Inc.*, 647 F.2d 18 (9th Cir. 1981). (App. 8a) The Ninth Circuit in *Weil* does not, however, disagree with *Garner*, nor does it "specifically hold," as Selox argues, that the good cause exception applies only in shareholder derivative actions. Rather, the Ninth Circuit stated, in a passage conveniently omitted from Selox's petition, "Without passing on the merits of *Garner*, we find it inapposite to the case before us." *Id.* at 23. The Ninth Circuit went on to hold that the privilege at issue had been waived, *id.* at 25, so that its earlier comments about inapplicability of *Garner* were dicta in any event.

The Sixth Circuit did not disagree with the actual holding of *Weil*; instead, the court simply stated that to the extent *Weil* holds that the attorney-client privilege of a corporation is absolute in a case brought by individual shareholders in their own right (the position urged by Selox but not actually held in *Weil*), the court rejected that position, as did the Fifth Circuit in *Garner*. (App. 8a)

Nor does the Sixth Circuit's decision conflict with *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988). In its petition (p. 7), Selox states that the Fifth Circuit in *Ward* "suggested" that the application of *Garner* be limited to derivative or quasi-derivative actions. Selox also states (p. 10) that the *Ward* court "specifically rejected" the application of

Garner to litigation that was neither derivative nor quasi-derivative in nature. Neither statement is accurate. The Fifth Circuit simply noted that where the shareholders seek to recover damages from the corporation for only themselves, the motivations behind the suit are more suspect, and thus more subject to careful scrutiny in determining if good cause for suspending the privilege exists. *Id.* at 786. The *Ward* court went on to apply the *Garner* criteria and found that the plaintiffs had not shown good cause in the situation before it. *Id.* at 786-7. Neither "specifically" nor by "suggestion" did the Fifth Circuit limit *Garner* as argued by Selox.

Thus, while Selox strains to find a conflict among the Fifth, Sixth and Ninth Circuits, there is none. Rather, the differences are factual. The major factual distinction between this case and the cases cited by Selox is Mr. Richardson's dual, simultaneous representation of the corporation and a controlling stockholder, while that stockholder was engaged in a fraudulent scheme to squeeze out the minority stockholders. The following passage from the opinion of the magistrate judge highlights this difference:

> [B]ecause the defendant White was acting for both himself and the corporation in his dealings with the attorneys and in the actions he took, and because decisions made under such circumstances are so inextricably intertwined, it is impossible for the undersigned to distinguish conversations between the defendant and his attorneys which were for personal matters and which were for corporate matters; and the privilege will not be

allowed to protect conversations related to either.

(App. 27a) The Sixth Circuit's opinion is merely another application of *Garner* to a different fact pattern; it is not a break with principles followed by other circuits.

III. THERE IS NO CONFLICT WITH OR MISAPPLICATION OF LOCAL LAW

While acknowledging that officers and directors of corporations generally owe fiduciary duties to their shareholders, Selox contends that the Sixth Circuit erred in its application of *Garner* because, according to Selox, Tennessee imposes no fiduciary obligation on officers, directors and controlling shareholders when they buy stock from outside, minority shareholders. Even if Selox is correct as to Tennessee law (which it is not), the question remains one of application of *Garner*, which does not turn on the precise boundaries of Selox's and defendant White's fiduciary obligations to the minority shareholders. Selox acknowledges the general existence of those duties, and that is sufficient for application of *Garner's* good cause test. Even incorrect application of *Garner* does not warrant certiorari review.

Furthermore, Selox must strain to create the conflict which it asserts gives rise to an issue suitable for certiorari review. The Tennessee case on which Selox relies to create this conflict is *Vance v. Schulder*, 547 S.W.2d 927 (Tenn. 1977), a case in which the question before the court was what statute of limitations to apply, not whether a fiduciary obligation exists in a context similar to the case at bar. Selox then misreads the case and seeks to elevate an am-

biguous statement in *Vance* to the position of settled Tennessee law.

The court in *Vance* held that the gravamen of the plaintiff's case was fraud in the inducement of a contract, the common law action of deceit, and that he sought damages resulting from his selling his stock at too low a price. *Id.* at 931. The court stated that the plaintiff could elect between two remedies—he may treat the contract as voidable and sue for rescission or he may treat the contract as existing and sue for damages under the theory of deceit. *Id.* at 931. The latter is grounded in tort and controlled by Tennessee's three-year statute of limitation for actions for injury to personal property. *Id.* at 931-3.

The Tennessee court did not, as contended by Selox, "explicitly reject" the view that officers, directors and controlling shareholders owe fiduciary duties to minority shareholders. That was not even an issue in the case, because the gravamen of the plaintiff's case was deceit, not breach of fiduciary duties. *Id.* at 931. The issue before the court was whether the injury alleged was injury to "personal or real property" under the three-year statute, and the court held it was.

Selox relies on dictum in which the Tennessee court says the case before it was not the "typical" situation where corporate insiders are trading stock with general stockholders. *Id.* at 931. That is not the situation in the case at bar either, because here plaintiffs allege, and have developed substantial evidence in discovery, that Selox, defendant White and others were engaged in a fraudulent scheme to squeeze out the minority shareholders of a closely-held corporation. This is no simple case of management trading in stock on inside information.

To the extent that the Sixth Circuit ruled that Selox and defendant White owed fiduciary duties to the plaintiffs, the court did not conflict with or misapply any clear Tennessee decision. In fact, the cases relied on by the Sixth Circuit more clearly state that the fiduciary duty exists. *Dale v. Thomas H. Temple Co.*, 186 Tenn. 69, 86-7, 208 S.W.2d 344, 352 (1948); *Johns v. Caldwell*, 607 S.W.2d 37 (Tenn. App.), *cert. denied* (1980) (officers, directors and controlling shareholders owe a fiduciary relationship to other shareholders; in buying or selling stock, directors may trade like an outsider, provided they do not affirmatively act or speak wrongfully, or intentionally conceal facts). This is precisely what plaintiffs assert, and the facts support. Selox and defendant White made affirmative misrepresentations and fraudulent omissions in buying plaintiffs' stock.

IV. THE SIXTH CIRCUIT CORRECTLY ALLOCATED TO SELOX THE BURDEN OF ESTABLISHING THE PRIVILEGE

Selox argues that somehow the Sixth Circuit improperly shifted to Selox the burden of establishing the applicability of the attorney-client privilege. On this point Selox is confused, because the party asserting the privilege always has that burden.

Every circuit holds that the party asserting the attorney-client privilege bears the burden of demonstrating that the privilege applies. *See, e.g., In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 450 (6th Cir. 1983), *cert. denied sub nom. Durant v. United States*, 467 U.S. 1246, 104 S.Ct. 3524, 82 L.Ed.2d 831 (1984) ("The burden of establishing the existence of the privilege rests with the person asserting it."); *United States v. Bay State Ambulance*

and Hospital Rental Service, Inc., 874 F.2d 20, 28 (1st Cir. 1989) ("The burden of proving the existence of the privilege is on the party asserting the privilege."); *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989) ("The burden of establishing the attorney-client privilege, in all its elements, always rests upon the person asserting it."); *In the Matter of Grand Jury Empanelled February 14, 1978 (Markowitz)*, 603 F.2d 469, 474 (3d Cir. 1979) (citation omitted) ("The burden of proving that the [attorney-client] privilege applies is placed upon the party asserting the privilege."); *United States v. Tedder*, 801 F.2d 1437,1441 (4th Cir. 1986), *cert. denied*, 480 U.S. 938, 107 S.Ct. 1585, 94 L.Ed.2d 775 (1987) ("[T]he proponent of the privilege . . . must prove its applicability."); *United States v. Rodriguez*, 948 F.2d 914, 916 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2970, 119 L.Ed.2d 590 (1992) ("The burden of establishing privilege rests on the party who invokes it."); *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991) ("The burden falls on the party seeking to invoke the privilege to establish all the essential elements."); *Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985), *cert. denied*, 475 U.S. 1119, 106 S.Ct. 1635, 90 L.Ed.2d 181 (1986) ("Initially, we note that the party who claims the benefit of the attorney-client privilege has the burden of establishing the right to invoke its protection."); *Dole v. Milonas*, 889 F.2d 885, 889 (9th Cir. 1989) ("And the party asserting the privilege has the burden of showing that it applies in the circumstances."); *United States v. Bump*, 605 F.2d 548, 551 (10th Cir. 1979) ("The burden of proving a communication is privileged is upon the person asserting the privilege."); *United States v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir.), *cert. denied*,

___ U.S. ___ , 112 S.Ct. 640, 116 L.Ed.2d 3417 (1991) ("The party invoking the attorney-client privilege has the burden of proving that an attorney-client relationship existed and that the particular communications were confidential."); *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) ("It remains the claimant's burden, however, to present to the court sufficient facts to establish the privilege. . . .").

The attorney-client privilege exists "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in observance of the law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d. 584 (1981). However, because the privilege is an obstacle to the investigation of the truth, "[i]t ought to be strictly confined within the narrowest possible limits, consistent with the logic of its principle." *Garner*, 430 F.2d at 1100-01 (quoting 8 Wigmore, Evidence, § 2291 at 554); *accord Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976) ("[S]ince the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose."); *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d at 451; *Prichard v. United States*, 181 F.2d 326, 328 (6th Cir.), *aff'd per curiam*, 339 U.S. 974, 70 S.Ct. 1029, 94 L.Ed. 1380 (1950).

In the present case, the Sixth Circuit did not change the burden of asserting the privilege; on the contrary, it assumed that Selox had already established the existence of the privilege and addressed only whether plaintiffs had shown good cause under *Garner* to avoid the privilege.

V. THERE EXIST AT LEAST TWO INDEPENDENT GROUNDS SUPPORTING THE SIXTH CIRCUIT'S DECISION

The Sixth Circuit's decision to affirm the district court's order is equally supportable under principles not raised in Selox's petition. First, Selox failed in the trial court to establish the factual elements necessary for the attorney-client privilege to apply. Second (although included in the preceding point), the privilege was not available because the communications involved fraudulent or criminal activity.

A.

As discussed in section IV of this brief, the party asserting the attorney-client privilege has the burden of establishing the elements necessary to make the privilege applicable to each communication for which protection is sought. Selox made no such showing; rather, it simply instructed Mr. Richardson to refuse to answer the questions and to refuse to produce the requested documents. Selox made no showing that the communications were not made in the presence of strangers or that the documents had not been released to persons outside of the attorney-client relationship. In one instance Mr. Richardson refused to testify about a conversation with defendant Lowe while admitting that Mr. Lowe was not seeking legal advice.

Nor did Selox establish that the communications related to its attorney-client relationship rather than defendant White's personal attorney-client relationship. Defendant White did not appeal the district court's order, and therefore only Selox's privilege was at issue before the Sixth Circuit. The magistrate judge

who considered the record, briefs and arguments on plaintiffs' motion to compel found that because defendant White's actions and dealings with the attorneys were "so inextricably intertwined," it was "impossible" for the magistrate judge to "distinguish conversations between the defendant and his attorneys which were for personal matters and which were for corporate matters." (App. 27a)

B.

Additionally, there can be no privilege if the communication was for the purpose of committing a crime or tort. *In re Antitrust Grand Jury*, 805 F.2d 155, 162-3 (6th Cir. 1986). Even while placing the burden on plaintiffs to make a *prima facie* showing that under the facts as alleged a prudent person would have a reasonable basis to suspect the perpetration of a crime or fraud, the magistrate judge correctly found that defendant White's activity could lead a prudent person to suspect the perpetration of a fraud. (App. 26a)

Plaintiffs' claims are premised on a fraudulent scheme led by defendant White to squeeze out the minority shareholders. The scheme included Selox's discontinuance of dividends supported by false claims of poor cash flow or actual cash shortages caused by defendant White's self-dealing transactions; defendant White's and Selox's purchase of minority shares at prices far less than they knew outsiders were willing to pay; and the extraction long after the fact of purported releases in connection with a number of these purchases. Mr. Richardson's law firm drafted the purchase documents as well as the purported releases.

Plaintiffs' motion to compel alleged that Mr. Richardson assisted and advised defendant White in these matters. (App. 36-7a) Despite this assertion, Selox failed to offer any proof in the trial court to the effect that the communications did not involve the commission of a crime or fraud. Instead, Selox rested on a blanket and unsupported assertion of the privilege. For these reasons, the privilege was never shown to attach in the first instance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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